BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JANE A. FUHR	)	
Claimant	)	
VS.	)	
	)	Docket No. 233,475
DILLON COMPANIES, INC.	)	
Respondent	)	
Self Insured	)	

JANE A. FUHR	)	
Claimant	)	
VS.	)	
	)	Docket No. 248,793
ALBERTSON'S, INC.	)	
Respondent	)	
Self Insured	)	

ORDER

Respondent Dillon Companies, Inc. (Dillon's) appealed the March 21, 2000 preliminary hearing Order entered by Administrative Law Judge Jon L. Frobish.

ISSUES

Claimant suffered bilateral upper extremity injuries during her employment with Dillon's. After leaving her employment with Dillon's, and during the time claimant was off work, her symptoms improved. Thereafter, when claimant returned to work with a new employer, namely Albertson's, her symptoms worsened. The dispute is which employer should bear the costs of claimant's current need for medical treatment. This gives rise to an issue of whether claimant's current condition is a direct and natural consequence of her employment with Dillon's or whether, instead, she suffered an aggravation from her work at Albertson's.

FINDINGS OF FACT

Claimant originally only asserted a claim against Dillon's, which is Docket No. 233,475. Following the entry of an award for preliminary hearing benefits Dillon's appealed and, based upon the record presented, the Board reversed the ALJ's Order finding it more

probably true than not that claimant had suffered an aggravation during her subsequent employment with Albertson's. Claimant then filed a claim against Albertson's which is Docket No. 248,793 and the two claims were consolidated by the ALJ for hearing and trial.

The ALJ determined that the testimony presented in Docket No. 233,475 before Albertson's was a party to this consolidated proceeding should not be considered. The parties then presented the ALJ with new evidence, including the deposition testimony of George L. Lucas, M.D., and James L. Gluck, M.D. Based upon the new evidence and record the ALJ again determined that claimant's injuries occurred as a result of her employment with Dillon's and entered an award for preliminary benefits accordingly. Dillon's appeals that finding. The record considered by the Appeals Board upon this review is the same record considered by the ALJ in making his preliminary Order of March 21, 2000. Therefore, the testimony taken before Albertson's was a party was not considered.[1]

Although not without interruption, claimant worked for Dillon's from 1988 until March, 1998. Beginning in 1989 she worked as a meat wrapper doing repetitive activity with her hands. She gradually developed symptoms of pain, numbness and tingling and was eventually referred to Dr. Gluck on August 27, 1997. Dr. Gluck diagnosed bilateral carpal tunnel syndrome, bilateral trigger fingers of the ring and little fingers and left trigger thumb. Surgery was recommended, beginning on the left, but not performed. During this time claimant left her work for Dillon's due to her injury. Claimant described her symptoms when she last worked for Dillon's as an 8 on a scale of 1 to 10.

Dillon's then changed claimant's medical treatment from Dr. Gluck to Dr. Melhorn. Thereafter Dr. Lucas became claimant's authorized treating physician. He first saw claimant on August 18, 1998 and likewise diagnosed bilateral carpal tunnel syndrome, noted triggering of the fingers and thumbs, and recommended surgery. A right carpal tunnel release and surgery on the right thumb and ring fingers were performed on October 6, 1998. Thereafter, and in part because claimant's left upper extremity symptoms had improved while off work, Dr. Lucas suggested claimant return to light duty work on a trial basis. Dr. Lucas gave claimant a release to full duty on December 23, 1998. Claimant began working at Albertson's on January 30, 1999.

Although during the period claimant was unemployed her symptoms improved, she was never symptom free. While working at Albertson's claimant's symptoms worsened, but never to the degree they had been at during her employment with Dillon's. Claimant described her job duties at Albertson's as less hand intensive than at Dillon's. Claimant rated her symptoms at Albertson's as a 4 on a scale of 1 to 10. Furthermore, while claimant agreed her work at Albertson's resulted in an increase in her symptoms, she and the doctors also believed that any type of activities with her hands would tend to cause her problems, whether at work or at home.

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[1] K.S.A. 44-555c(a).

The treatment claimant is now seeking is the same treatment recommended by Dr. Gluck while claimant was still employed at Dillon's and likewise recommended by Dr. Lucas before claimant started working for Albertson's. Surgery on the left was not performed by Dr. Lucas, however, because of the improvement claimant experienced while not working and the decision to attempt a return to regular work on a trial basis. While the work at Albertson's has resulted in an increase in symptoms, the record shows this work has not increased or aggravated her symptoms to the degree claimant was experiencing at the time she left her employment with Dillon's.

CONCLUSIONS OF LAW

Ascribing liability for ongoing injury for repetitive trauma cases has never been an exact science. Our appellate courts have struggled to develop rules and policies for such cases. The bright line rule announced in Berry[2] and amplified in Treaster,[3] is to place the accident date as late as possible.

> Because of the complexities of determining the date of injury in a repetitive use injury, a carpal tunnel syndrome, or a micro-trauma case that is the direct result of claimant's continued pain and suffering, the process is simplified and made more certain if the date from which compensation flows is the last date that a claimant performs services or work for his or her employer or is unable to continue a particular job and moves to an accommodated position.[4]

To the extent this may result in certain inequities when ascribing liability between successive/multiple insurance carriers of a single employer/respondent is given little consequence.

> We fail to see why the rule laid down in Berry should not be applied equally in a case where the dispute is over coverage between two insurance companies. The actual date of injury is very difficult to pinpoint in these cases, but the last day of work is not. This case is controlled by Berry.[5]

Of seemingly greater significance, however, is the situation where the claimant changes employment and there are multiple or successive employers.[6] This is particularly

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[2] Berry v. Boeing Military Airplanes, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994).

[3] Treaster v. Dillon Companies, Inc., 267 Kan. 610, 987 P.2d 325 (1999).

[4] Treaster, Syl. ¶ 3.

[5] Anderson v. Boeing Co., 25 Kan. App. 2d 220, 222, 960 P.2d 768 (1998).

[6] *See,* e.g., Surls v. Saginaw Quarries, Inc., Docket No. 83,095 (Kan. App. 2000).

true in cases where the claimant/worker left work because of the injury as opposed to simply changing jobs for purely economic reasons.

Kansas Courts have shown a clear preference for finding one accident date and one injury in repetitive trauma cases. That date is either when claimant leaves work due to the injury or:

> Where an accommodated position is offered and accepted that is not substantially the same as the previous position the claimant occupied, the date of accident or occurrence in a repetitive use injury, a carpal tunnel syndrome, or a micro-trauma case is the last day the claimant performed the earlier work tasks.[7]

Obviously, claimant suffered an accidental injury at Dillon's and an accident date is easy to ascribe because she left that job because of her injury. If we were to look solely at claimant's employment at Albertson's, however, an accident date could not yet be established because neither of the triggering events described in Treaster has occurred. Thus, if claimant is suffering a series of repetitive trauma injuries from her employment at Albertson's, it is an ongoing injury because she continues to work there at the same unaccommodated job. Claimant argues she has not been injured at Albertson's, only that her symptoms have worsened.

Finally, it is important to note that these cases dealing with date of accident for repetitive trauma injuries were generally concerned with affixing liability for permanent disability compensation, not for preliminary medical benefits.

> At this point, we pause to note that **our opinion deals only with compensating a claimant for disabilities** suffered as a result of carpal tunnel syndrome. It does not and should not be confused with whether the condition is job related **and has nothing to do with medical reimbursements for an on-the-job injury or occupational disease**. (Emphasis added.)
>
> Under our statutory scheme, disability compensation must begin at some fixed point in time. In the case of disability which is the result of a personal injury caused by accident, the date of the accident becomes the date from whence compensation flows. K.S.A. 44-510e(a)(1). In the case of an occupational disease, the injury or condition is deemed to have "occurred" on the last day worked. K.S.A. 44-5a06.[8]

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[7] Treaster, Syl. ¶ 4.

[8] Berry at 228.

It may be possible, therefore, to have one accident date for purposes of an award of permanent disability and another for purposes of awarding medical benefits, such as in the case of a temporary aggravation. In general, however, the question of whether the worsening of claimant's preexisting condition is compensable as a new, separate and distinct accidental injury under workers compensation turns on whether claimant's subsequent work activity at Albertson's aggravated, accelerated or intensified the underlying disease or affliction.[9]

When the primary injury under the Workers Compensation Act is shown to arise out of and in the course of employment, every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of the primary injury.[10] It is not compensable, however, where the worsening or new injury would have occurred even absent the primary injury or where it is shown to have been produced by an independent intervening cause.[11]

There is a fine line between mere exacerbation of symptoms and an aggravation such that there would be a new accidental injury for purposes of workers compensation. Based upon the current record, the Appeals Board finds that claimant's work at Albertson's following her employment with Dillon's, though a factor in claimant's increased symptoms, was not an intervening cause of claimant's injury. Her condition, therefore, is compensable as a direct and natural consequence of the original March 1998 repetitive trauma injury. Accordingly, respondent Dillon's should remain liable for claimant's ongoing medical treatment.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order dated March 21, 2000 entered by Administrative Law Judge Jon L. Frobish should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of June 2000.

BOARD MEMBER

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[9] *See*, Boutwell v. Domino's Pizza, 25 Kan. App. 2d 100, 959 P.2d 469, *rev. denied* ___ Kan. ___ (1998).

[10] Jackson v. Stevens Well Service, 208 Kan. 637, 493 P.2d 264 (1972).

[11] Nance v. Harvey County, 263 Kan. 542, 952 P.2d 411 (1997); Stockman v. Goodyear Tire & Rubber Co., 211 Kan. 260, 505 P.2d 697 (1973). *See also* Bradford v. Boeing Military Airplanes, 22 Kan. App. 2d 868, 924 P.2d 1263, *rev. denied* 261 Kan. 1082 (1996).

c: W. Walter Craig, Wichita, KS
Scott J. Mann, Hutchinson, KS
Frederick L. Haag, Wichita, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director